Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

WAYNE SCOTT, ET AL.,
Petitioners,

v.

MICHELLE HANSEN, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of North Dakota

PETITION FOR WRIT OF CERTIORARI

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APP

QUESTION PRESENTED

When a State sends a paroled prisoner to another State for supervision under the Interstate Compact for the Supervision of Parolees and Probationers, and the sending State's parole officials conduct activities required to implement the Compact, do these contacts suffice as the minimum contacts necessary to allow the receiving State to exercise specific personal jurisdiction over the sending State's parole officials?

LIST OF PARTIES

Petitioners are named and unnamed employees of the Texas Department of Criminal Justice: Wayne Scott, Ray Parra, Rey Selvera, William H. Brooks, Cathy Doyle, Veronica Ballard, Carl Jeffries, Ethel White, Larry Hermance, Cynthia Lyons, John Doe #1, John Doe #2, John Doe #3, John Doe #4 and John Doe #5. Petitioners were appellees in the North Dakota Supreme Court proceeding sought to be reviewed. App., at 1a.[1]

Respondents are Michelle Hansen, Stacey Hanson, and Michelle Hansen as representative of the estates of Gordon and Barbara Erickstad. Respondents were appellants in the North Dakota Supreme Court. *Id.*

The North Dakota Supreme Court caption includes defendant Robert R. Lawrence, although he was not a party to the to the final judgment entered by the state district court and certified for appeal. *Id.*, at 36a. Petitioners do not list Lawrence because he is not a "part[y] to the proceeding in the court whose judgment is sought to be reviewed." SUP. CT. R. 14.1(b).

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1. The North Dakota Supreme Court caption erroneously lists only the named employees as appellees. App., at 1a. The unnamed employees were parties to the final judgment rendered by the state district court and certified for appeal, and therefore, the North Dakota Supreme Court caption should have listed them as appellees. *Id.*, at 36a.

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PETITION FOR WRIT OF CERTIORARI

The North Dakota Supreme Court erroneously held that North Dakota can constitutionally exercise personal jurisdiction over Texas parole officials simply because they transferred a parolee to North Dakota under the Interstate Compact for the Supervision of Parolees and Probationers. The court's decision threatens the Compact's viability by imposing a substantial and unforseen burden on the States: defending their parole officials in proceedings nationwide in any case involving a transferred parolee's acts. Also apparent with the decision is that the Court's personal jurisdiction jurisprudence has left unaddressed how to assess the activities of state actors performing noncommercial, public duties within the Court's due-process framework. The Court should grant the petition for writ of certiorari to resolve these important and unsettled questions of federal law. *See* SUP. CT. R. 10(c).

OPINIONS AND ORDERS BELOW

The North Dakota Supreme Court's opinion is reported as *Hansen v. Scott*, 2002 ND 101, 645 N.W.2d 223. App., at 1a. The North Dakota Supreme Court's order denying the Texas defendants' petition for rehearing is unreported. *Id.*, at 38a. Also unreported are the state district court's opinion and order dismissing the claims against the Texas defendants, *id.*, at 27a, that court's order certifying its ruling for interlocutory review, *id.*, at 34a, and its final judgment rendered in favor of the Texas defendants, *id.*, at 36a.

JURISDICTION

The North Dakota Supreme Court rendered its opinion and judgment on June 10, 2002, and denied the Texas defendants' petition for rehearing on July 30, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, §1.
>
> Interstate Compact for the Supervision of Parolees and Probationers.[2]

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2. The Compact is in the nature of a treaty among the member States, but each State also has codified the Compact in its statutes. *See, e.g.*, N.D. CENT. CODE §12-56-01; TEX. CODE CRIM. PROC. art. 42.11. Due to the length of the Compact, the citation alone appears here; the pertinent text is set forth in the Appendix at 40a. *See* SUP. CT. R. 14.1(f).

STATEMENT OF THE CASE

In March 1997, Robert Lawrence, an inmate in custody of the Texas Department of Criminal Justice (TDCJ), applied to serve his parole in North Dakota upon his expected release later that year. Appellant's App., at 66.[3] Lawrence made his application under the Interstate Compact for the Supervision of Parolees and Probationers. *Id.* The Compact provides the sole statutory authority for the transfer of parolee supervision from one State to another. All fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands are members of the Compact.

In response to Lawrence's application and pursuant to compact procedure, TDCJ requested that the North Dakota Department of Corrections and Rehabilitation investigate Lawrence's application and accept transfer of supervision. App., at 28a. North Dakota agreed to supervise Lawrence's parole under the Compact. *Id.*, at 3a. In June 1997, TDCJ released Lawrence from custody and he began living with his sister in Mandan, North Dakota. *Id.*

In December 1997, North Dakota reported to TDCJ that Lawrence had been charged with providing false information to a police officer and was in custody. *Id.*, at 4a. North Dakota recommended that TDCJ issue an arrest warrant to return Lawrence to Texas for parole revocation proceedings. Appellant's App., at 92. TDCJ issued the warrant and sent it to North Dakota. App., at 4a.

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3. The Record in the North Dakota Supreme Court proceedings was not paginated. Accordingly, citations to the Record refer to the name of the document in the Record (*e.g.*, Appellant's Appendix, Motion to Dismiss, Petition for Rehearing) and its internal pagination. "Appellant's App." refers to the appendix filed by the appellants in the North Dakota Supreme Court, which is part of the Record. "App." refers to the Appendix that follows this petition. *See* SUP. CT. R. 14.1(i).

In February 1998, Lawrence was convicted of providing false information to a police officer and received a nine-month sentence in the North Dakota State Penitentiary. *Id.* North Dakota reported the conviction to TDCJ and advised that North Dakota would continue to supervise Lawrence after his sentence in lieu of returning him to Texas for parole revocation proceedings under the Texas warrant. Appellant's App., at 105. TDCJ agreed to let North Dakota continue supervision under the Compact. *Id.*, at 106.

In September 1998, North Dakota notified TDCJ that Lawrence had been released from prison the previous month, but had not contacted his parole officer. App., at 4a. North Dakota recommended that TDCJ issue another warrant to return Lawrence to Texas for parole revocation proceedings. *Id.* Shortly after TDCJ received this report, Gordon and Barbara Erickstad were murdered in Bismarck, North Dakota. *Id.* Lawrence and the Erickstads' son, Brian, were arrested and charged with the murders. *Id.*, at 3a. In October 1999, a jury convicted Lawrence and Erickstad on all counts. *See State v. Erickstad*, 620 N.W.2d 136 (N.D. 2000). The North Dakota Supreme Court affirmed the convictions. *Id.*

In October 2000, the Erickstads' daughters, Michelle Hansen and Stacy Hanson, filed this action against various TDCJ employees ("the Texas defendants") and Lawrence in North Dakota state court. App., at 4a. The complaint asserted wrongful death and survivorship claims against all defendants and additional claims against the Texas defendants under 42 U.S.C. §1983. *Id.* The Erickstads' daughters alleged that the Texas defendants had breached their duty of care by failing to disclose Lawrence's entire criminal record to North Dakota, by failing to supervise Lawrence's parole according to compact procedures, and by acting unreasonably in developing and implementing TDCJ procedures for returning compact parolees to Texas for parole revocation. *Id.*, at 4a-5a.

The Texas defendants entered a special appearance and filed a motion to dismiss for lack of personal jurisdiction. *Id.*, at 5a. The Texas defendants contended there was no jurisdiction under the relevant section of North Dakota's long-arm statute, N.D. R. Civ. P. 4(b)(2)(C), because the complaint had not alleged a tort. Mot. to Dismiss, at 5. Even if the long-arm requirements were met, however, the Texas defendants argued the trial court could not exercise personal jurisdiction over them "because they do not have the constitutionally required minimum contacts with the State of North Dakota." *Id.*, at 6.

The trial court held that the Texas defendants had sufficient contacts with North Dakota to satisfy the Due Process Clause, but the allegations of the complaint did not set forth a tort as required by the long-arm statute. App., at 31a. The trial court certified its ruling for review and entered a final judgment dismissing the Texas defendants. *Id.*, at 34a-37a. The Erickstads' daughters appealed to the North Dakota Supreme Court.[4]

In their Appellees' Brief, the Texas defendants reiterated their position that North Dakota could not exercise personal jurisdiction over them in this action, arguing that to do so would violate due process:

> "The lower court's exercise of personal jurisdiction over the Texas Defendants would violate their due-process rights because they had insufficient contacts with the State of North Dakota, and the maintenance of the suit in North Dakota would offend traditional notions of fair play and

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4. The Texas defendants were not required to cross-appeal the trial court's ruling that they had constitutionally sufficient contacts with North Dakota to preserve that issue. As the North Dakota Supreme Court held, because the trial court had granted all relief sought by the Texas defendants, they were free to re-urge on appeal any argument advanced in the trial court in support of that relief. App., at 19a.

substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945)." Appellees' Brief, at 24-25.

The North Dakota Supreme Court reversed the trial court and held that North Dakota could exercise personal jurisdiction over the Texas defendants in this action. In its opinion, the court ruled that the complaint satisfied the relevant provisions of the long-arm statute. App., at 17a. Turning to the constitutional issue, the court stated that the Texas defendants had "purposely availed themselves of the privilege of sending Lawrence to North Dakota" under the Compact and "directed activity regarding Lawrence to North Dakota." *Id.*, at 24a. The court further held that the Texas defendants' contacts with North Dakota regarding Lawrence were "such that they could reasonably anticipate being haled into court in North Dakota." *Id.*, at 25a. Although these contacts were "mandated by the Interstate Compact," the court nevertheless found that they "militate in favor of the exercise of personal jurisdiction." *Id.* Accordingly, the court concluded that "the exercise of personal jurisdiction over the Texas defendants does not offend traditional notions of substantial justice, fair play, or due process of law." *Id.*

In their petition for rehearing, the Texas defendants again argued that the North Dakota Supreme Court "should rule that it violates due process to subject the Texas Defendants to personal jurisdiction." Pet. for Rehearing, at 10. The court denied the petition. App., at 38a-39a.

SUMMARY OF ARGUMENT

The North Dakota Supreme Court's decision threatens the continued viability of the Interstate Compact for the Supervision of Parolees and Probationers. The North Dakota court effectively added a new requirement to the Compact by holding that ordinary compact operations waive the due-process limitations on a state court's exercise of specific personal jurisdiction over other

compacting States' parole officials. Given the volume and national scope of compact activities, the decision imposes a tremendous burden on the compacting States. If States must defend their parole officials in any State where someone files a lawsuit arising from a transferred parolee's wrongful acts, they will undoubtedly reconsider their participation in the Compact. That other lower courts are in conflict with the North Dakota Supreme Court on this issue further warrants the Court's intervention.

The North Dakota Supreme Court's decision also reveals a gap in this Court's due-process jurisprudence. It is clear that a State may not exercise specific personal jurisdiction over a nonresident defendant not present in the State unless the defendant "purposefully availed himself of the privilege of conducting activities in the forum State, thereby invoking the benefits and protections of its laws." The Court has, however, never addressed whether state actors who contact other States in performing noncommercial, public duties "purposefully avail" themselves of the privilege of conducting activity in those States, and instead has considered the meaning of "purposeful availment" almost exclusively in commercial cases. Without guidance from this Court, the North Dakota Supreme Court summarily concluded that the Texas defendants had "purposefully availed themselves of the privilege of sending Lawrence to North Dakota," a holding that lacks a foundation in this Court's commercial-context cases and undermines the purpose and function of the Compact. In the interest of continued and effective operation of the Compact, the Court should review the incongruous application of the Court's "purposeful availment" rulings to the Texas defendants' noncommercial, public activity. *See* SUP. CT. R. 10(c).

ARGUMENT

I. THE COURT SHOULD RESOLVE THE IMPORTANT QUESTION OF DUE-PROCESS LIMITATIONS ON PERSONAL JURISDICTION IN THE CONTEXT OF AN INTERSTATE COMPACT.

A. The Court Is Uniquely Positioned to Review State Court Decisions That Undermine Interstate Compacts.

Because the North Dakota Supreme Court's decision threatens the viability of a law of the United States and the several States, it warrants review by this Court. The Court has previously recognized its authority "to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States." *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

In reversing the West Virginia Supreme Court's determination that an appropriation under an Ohio River Valley interstate compact would violate the West Virginia Constitution, this Court recognized its role in adjudicating such a dispute, despite the fact that it involved an interpretation of state law: "To determine the nature and scope of obligations as between States [that] . . . arise through the legislative means of compact . . . is the function and duty of the Supreme Court." *Id.*, at 28.

The Court has an even more pressing duty to review the North Dakota Supreme Court's decision in this case. Whereas *Dyer* involved only the interpretation of state law, this case concerns a state court's ruling that misinterprets this Court's constitutional jurisprudence. Moreover, the interstate compact at issue here claims nationwide membership of all fifty States and other United States jurisdictions. Given its scope and purpose, the Compact provides an important "means of safeguarding the national interest." *Id.*, at 27. The necessity of its continued viability merits the Court's attention.

B. The North Dakota Supreme Court's Decision Threatens the Operation of This, and Other, Interstate Compacts.

The Crime Control Act of 1934 authorized States "to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies." 4 U.S.C. §112(a). With this advance congressional consent, States began in 1937 to form the Interstate Compact for the Supervision of Parolees and Probationers. PAROLE & PROBATION COMPACT ADMINISTRATORS' ASSOCIATION, INTERSTATE COMPACT FOR THE SUPERVISION OF PAROLEES AND PROBATIONERS MANUAL 1.1 (1996) ["PPCAA MANUAL"]. All fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands have joined the Compact, codifying it into their laws. *Id.*, at 1.6; *see also supra* note 2.[5] Because Congress has approved the Compact, it is also a federal law. *Cuyler v. Adams*, 449 U.S. 433, 438 (1981).

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5. The compact participants are in the process of executing a new compact to supersede the Interstate Compact for the Supervision of Parolees and Probationers: The Interstate Compact for Adult Offender Supervision ("ICAOS"). *See* James G. Gentry, *The Interstate Compact for Adult Offender Supervision: Parolee and Probationer Supervision Enters the Twenty-First Century*, 32 MCGEORGE L. REV. 533, 536 (2001). ICAOS will serve the same purpose as the existing Compact—to administer the transfer of parolee and probation supervision across state lines; however, ICAOS improves the function of the Compact. *See* The Council of State Governments, *Interstate Compact for Adult Supervision: Frequently Asked Questions (Vol. 2)* 1-4 (Jan. 2001) <http://www.statesnews.org/clip/policy/faq.pdf>. As of the filing of this petition, 38 States have adopted ICAOS, and 10 additional States have introduced it for consideration. *See* The Council of State Governments, *Interstate Compact for Adult Supervision: State-by-State Status* (last modified Oct. 8, 2002) <http://www.statesnews.org/clip/policy/ISC2.htm>. Like the existing Compact, ICAOS does not address the personal jurisdiction issue decided by the North Dakota Supreme Court.

The Compact provides the sole statutory authority for the transfer of supervision of parolees from one State to another. PPCAA MANUAL, at 1.1. The policy rationale for sending parolees to other States is that, in many cases, relocation may "improve the employment and social situations of the parolee" relative to those in the custodial State, thereby facilitating the parolee's return to society. *See id.*, at 2.2. The Compact provides a mechanism for such transfers, while allowing "both the sending and receiving states to continue their control and supervision over the individuals involved." *Id.* The paramount purpose of the Compact is "to enhance public safety." *Id.*, at 1.1.

The States' current efforts to rework and improve the Compact reflect their continued interest in a cooperative system for transferring supervision of parolees across state lines. *See supra* note 5. The sheer number of transferees justifies this interest. Currently, the States supervise over 250,000 transferred parolees and probationers. *Frequently Asked Questions*, *supra* note 5, at 1. The States' efforts to rehabilitate these offenders would be frustrated if they did not have a workable mechanism for placing offenders in the State most conducive to that purpose.

The North Dakota Supreme Court's decision now forces States to weigh this important objective against a substantial burden they did not bargain for in joining the Compact. Upon adopting the Compact, each State submitted to the oversight of the Parole and Probation Compact Administrators' Association. PPCAA MANUAL, at 9.1-9.2. In both the existing Compact and its successor, however, the States did not expressly consent to personal jurisdiction in the courts of other compact States. The North Dakota Supreme Court has effectively written this consent into the Compact by holding that core compact functions—transferring a parolee and sending follow-up communications—suffice to subject a State's parole officials to specific personal jurisdiction in the courts of any State where it sends a parolee. App., at 24a-25a.

The burden of defending state employees in any jurisdiction where someone sues over a transferred parolee's acts dramatically alters the calculus for States in weighing their continued participation in the Compact. For example, in the latest survey of transfer populations, Rhode Island reported that it had transferred 691 probationers and parolees to forty-two different Compact jurisdictions.[6] Under the North Dakota Supreme Court's reasoning, anyone filing a lawsuit in one of those forty-two jurisdictions arising from the wrongful acts of one of the 691 transferees could hale Rhode Island's parole officials into court, however spurious the claim against those officials. The potential costs of defending such litigation are an obviously large and unanticipated burden for any State. The hardship to a large State such as Texas, which currently has over 14,000 transferred probationers and parolees in fifty-two different compact jurisdictions,[7] cannot be overstated.

If a State were to renounce the Compact in the face of this potentially overwhelming burden, the effect would reverberate through the remaining compact States and that State itself. The renouncing State would remove itself as a destination for parolees from other States. More significantly, the renouncing State would have no choice but to release all probationers and parolees into its own territory, regardless of how dim a parolee's rehabilitation prospects were in that State. This rule of law undermines the Compact—and indeed any similar interstate compact—and demands this Court's review.[8]

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6. *See* National Institute of Corrections, *Results from the Interstate Compact Planning Survey* (2002) <http://www.take-survey.com/cgi-bin/specials/nic/icp_reports.pl>.

7. *See id.*

8. Indeed, the State of North Dakota itself perceived the problems occasioned by a finding of personal jurisdiction and filed an amicus brief in support of the Texas defendants in the North Dakota Supreme Court.

C. Other Lower Court Decisions Conflict with the North Dakota Supreme Court.

Two other courts have addressed the precise issue of this case and both reached conclusions at odds with the North Dakota Supreme Court.

In *Hodgson v. Mississippi Department of Corrections*, 963 F.Supp. 776 (E.D.Wis. 1997), a Wisconsin citizen brought a wrongful death action in federal district court in Wisconsin against the Mississippi Department of Corrections and two of its employees. The plaintiff filed suit after his daughter was murdered by a Mississippi parolee transferred to Wisconsin under the Compact. *Id.*, at 781. In granting the Mississippi defendants' motion to dismiss for lack of personal jurisdiction, the district court held that "requests to transfer prisoners from Mississippi to Wisconsin . . . cannot be characterized as acts by which the Defendants purposefully availed themselves of the privilege of conducting activities within Wisconsin or acts which should have reasonably led them to anticipate being haled into court here." *Id.*, at 796 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).[9]

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9. Although the district court considered jurisdiction under Wisconsin's long-arm statute, it applied the constitutional standard set forth in *Hanson*, presumably because Wisconsin's long-arm statute permits jurisdiction to the full extent of due process. *See State ex rel. N.R.Z. v. G.L.C.*, 447 N.W.2d 533, 535 (Wis. 1989).

The North Dakota Supreme Court acknowledged *Hodgson*, but found it unpersuasive because the district court had cited *Adden v. Middlebrooks*, 688 F.2d 1147 (CA7 1982), in its discussion. App., at 23a. *Adden* involved a wrongful death suit against nonresident corrections officials arising from the acts of prison *escapees*, which the North Dakota Supreme Court found inapposite. *Id.* While the distinction may be valid, the *Hodgson* court cited *Adden* only as additional, persuasive authority. *Hodgson*, 963 F.Supp., at 796. Supplemental

Similarly, in *Nieder v. Gacy*, 460 N.E.2d 342 (Ill. App. Ct. 1984), an Illinois citizen brought a wrongful death action in Illinois state court against the Iowa State Board of Parole after her son was murdered by an Iowa parolee transferred to Illinois under the Compact. *Id.*, at 343, 345. As in this case, the plaintiff claimed that Iowa parole officials had failed to supervise the parolee while on parole in Illinois, and had failed to revoke his parole when he was later arrested in Illinois. *Id.*, at 345.

The trial court dismissed the parole board for lack of personal jurisdiction, and the plaintiff appealed. *Id.*, at 344. The Appellate Court of Illinois affirmed, holding that the parole board's actions did not satisfy *International Shoe*'s "minimum contacts" test. *Id.*, at 345. The court noted that "none of the parole board's actions of which plaintiff complains demonstrate the parole board's invocation of the benefits and protections of the laws of Illinois. The parole board engaged in the alleged acts in Iowa pursuant to Iowa law." *Id.* The fact that Iowa transferred the parolee under the Compact did not, in the court's view, "make the connection between the parole board and Illinois any less tenuous." *Id.*

The emergence of conflicting decisions regarding personal jurisdiction premised on the administrative activity of officials performing compact duties threatens an imbalance in the Compact. Cautious parole officials will avoid transferring parolees to States like North Dakota where doing so may subject them to personal jurisdiction. On the other hand, parole officials will readily transfer parolees to States whose courts have decided this issue in their favor. The compacting States recognize that their agreement is best served if all States are on equal footing. *See* Interstate Compact for Adult Offender Supervision art. I (one purpose of new compact is "to equitably distribute the costs, benefits, and obligations of the

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citation did not corrupt its earlier analysis under *World-Wide Volkswagen Corp.* and *Hanson*.

compact among the compacting states"). The Court should grant the petition to resolve this conflict among the lower courts and preclude any imbalance in the Compact.

II. THIS CASE RAISES IMPORTANT AND UNSETTLED QUESTIONS ABOUT DUE PROCESS LIMITATIONS ON PERSONAL JURISDICTION OVER NONRESIDENT STATE ACTORS PERFORMING PUBLIC DUTIES.

A State may exercise personal jurisdiction over a nonresident defendant not present in the State only if the defendant has "certain minimum contacts with [the forum State] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe*, 326 U.S., at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Court has explained that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S., at 253.

The North Dakota Supreme Court erroneously found "purposeful availment" by the Texas defendants through its forced adaptation of this Court's jurisprudence. The Court has considered the meaning of "purposeful availment" almost exclusively in cases that focus on defendants' commercial activities and interests. On the one occasion when the Court faced this issue in the noncommercial context, it concluded that "purposeful availment" was lacking. The Court has never addressed whether state actors' contacting another State to perform official duties in aid of the public interest satisifies *Hanson*'s "purposeful availment" requirement.

That this unsettled question of federal law implicates interstate compacts only reinforces the need for the Court's attention. *See* Part I., *supra*. Because many interstate compacts concern noncommercial, public interests, the Court should determine whether communication by state actors with other States under the

terms of such compacts satisfies *Hanson's* "purposeful availment" requirement.

A. The Court's Explications of "Purposeful Availment" Are Tied to the Commercial Context.

Courts applying the constitutional standard for exercising personal jurisdiction over nonresidents must confront the issue of "purposeful availment," as this Court has labeled that element "essential" to due process. *Hanson*, 357 U.S., at 253. The Court has defined this requirement, however, almost exclusively in terms specific to commercial cases.

The Court developed the "purposeful availment" requirement as a refinement of *International Shoe*'s "minimum contacts" test. "The unilateral activity of those who claim some relationship with a nonresident defendant" could not qualify as the necessary minimum contacts. *Hanson*, 357 U.S., at 253. Rather, there must be contacts "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum, thereby invoking the benefits and protections of its laws." *Id.*

The *Hanson* Court cited *International Shoe* as the source for the "purposeful availment" element. *Id.* (citing *Int'l Shoe*, 326 U.S., at 319). A look at the referenced language from *International Shoe* reveals that the concept of "purposeful availment" was born in the commercial context:

> "[T]o the extent that a *corporation* exercises the privilege of conducting activities within a State, it enjoys the benefits and protections of the laws of that State. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the State, a procedure which requires the *corporation* to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." 326 U.S., at 319 (emphasis added).

The Court recognized that business could flourish only under the aegis of state law, and fairness required that corporations answer for any obligations arising from their commercial activities.

Since *Hanson*, the Court has never suggested that *only* commercial actors may avail themselves of the benefits and protections of another State's law, thereby subjecting them to personal jurisdiction. At the same time, the Court has acknowledged that the evolution of due-process standards for personal jurisdiction "is largely attributable to a fundamental transformation in the American economy." *World-Wide Volkswagen*, 444 U.S., at 293. Consequently, the Court has developed the meaning of "purposeful availment" primarily in commercial cases.

For example, the Court has held that a commercial actor purposefully avails himself of benefits and protections of a forum's laws by directing business activity there. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992) (defendant issued debt instruments payable in forum and appointed financial agent there); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479-82 (1985) (defendant entered into franchise agreement governed by forum's law with corporation domiciled in forum); *Calder v. Jones*, 465 U.S. 783, 789-90 (1984) (defendants authored magazine article knowing it would be circulated in forum); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984) (defendant publisher circulated magazine in forum). In turn, the Court has elaborated on commercial activity that does not qualify as "purposeful availment." *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (plurality op.) (placement of product into stream of commerce, without more, is not purposeful availment); *Rush v. Savchuk*, 444 U.S. 320, 328-29 (1980) (defendant's contract with insurer that conducted business in forum was not purposeful availment); *World-Wide Volkswagen*, 444 U.S., at 297-98 (no purposeful availment where defendant made no effort to serve forum as a market for its product); *Shaffer v. Heitner*, 433 U.S. 186,

215-16 (1977) (accepting positions as officers or directors of entity incorporated in forum does not demonstrate purposeful availment).

The assessment of the "purposeful availment" element in so many commercial cases has produced a jurisprudence expressed largely in commercial terms. For example, in holding that physical entry into a State is not germane to a finding of "purposeful availment," the Court has explained:

> "Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence with a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Burger King Corp.*, 471 U.S., at 476.

Similarly, in describing how the privilege of conducting activity in a forum invokes the benefits and protections of its laws, the Court noted that a corporate defendant "which chose to enter the [forum's] market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner." *Keeton*, 465 U.S., at 781. Aside from the reciprocal benefit of access to a forum's courts, the Court has pointed out that a commercial actor that purposefully avails itself of conducting activity in a forum can mitigate its litigation risks through decidedly commercial means, "by procuring insurance" or "passing the expected costs on to consumers." *World-Wide Volkswagen*, 444 U.S., at 297.

By contrast, the Court has considered the meaning of "purposeful availment" only once in a non-commercial context. *See Kulko v. Superior Court*, 436 U.S. 84, 100-01 (1978). And in *Kulko*, it was the very absence of any commercial activity by, or benefit to, the defendant that informed the Court's conclusion that "purposeful availment" was lacking.

Kulko concerned a married couple who had entered into a separation agreement that they later incorporated into the terms of a divorce decree procured in Haiti. *Id.*, at 87. The agreement provided that the couple's two children would live with their mother during school vacations, but otherwise would live with their father in New York. *Id.* The agreement also required the father to make child support payments to the mother. *Id.* The oldest child later expressed her desire to live with her mother in California, and the father acquiesced in this request. *Id.*, at 88. A few years later, the mother brought suit in California, seeking to domesticate the Haitian divorce decree and modify its terms, so that she would have full custody of the children and increased support payments. The father appeared specially to contest personal jurisdiction. *Id.*

After the California Supreme Court held that the father was subject to personal jurisdiction because he had purposefully availed himself of the benefits and protections of California's laws by sending his child to live there with his ex-wife, this Court reversed. *Id.*, at 101. The Court relied on the fact that the father was not a commercial actor and distinguished its earlier decisions on "purposeful availment" as not offering a "fair analogy":

> "The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations. It thus cannot be said that appellant has sought a commercial benefit from solicitation of business from a resident of California that could reasonably render him liable to suit in a state court; appellant's activities cannot

> fairly be analogized to an insurer's sending an insurance contract and premium notices into the State to an insured resident of the State." *Id.*, at 97 (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957)).

The Court further acknowledged that the development of due-process standards for personal jurisdiction was not directed toward noncommercial activity:

> "In *McGee v. International Life Ins. Co.*, we commented on the extension of *in personam* jurisdiction under evolving standards of due process, explaining that this trend was in large part 'attributable to the . . . increasing nationalization of commerce . . . [accompanied by] modern transportation and communication [that] have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.' But the mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction." *Kulko*, 436 U.S., at 101 (citations omitted).

While *Kulko* does not resolve this case, its focus on the noncommercial nature of the defendant's activity suggests other noncommercial conduct may not be "fairly analogized" to the Court's "purposeful availment" decisions.

B. State Actors Performing Public Duties Under Interstate Compacts Do Not "Purposefully Avail" Themselves of the Privilege of Conducting Activity in Other States.

This case presents a kind of noncommercial activity for which the Court's current "purposeful availment" jurisprudence is unsuited: state actors performing nonproprietary, public duties

under interstate compacts.[10] The incongruity is best understood in light of the function of the compact at issue here.

Under Article (5) of the Compact, the compacting States agree:

> "[t]hat the governor of each state may designate an officer who, acting jointly with like officers of other contracting states . . . shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact." Interstate Compact for the Supervision of Parolees and Probationers art. (5). App., at 41a.

The States have promulgated such rules in the PPCAA MANUAL, and must follow PPCAA MANUAL regulations in implementing the Compact. PPCAA MANUAL, at 2.2.

Under the PPCAA MANUAL, when a State sends a parolee to another State, the sending State does not continue to supervise the parolee in the receiving State. Rather, the "receiving state shall assume the duties of visitation of and supervision over probationers or parolees." *Id.*, at 3.18, §4-101. The receiving State also determines the degree of supervision. *Id.*, at 3.18, §4-102. The sending State retains an interest in the parolee only insofar as it released the parolee from a sentence and the parolee must comply

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10. To be sure, interstate compacts can serve a proprietary or commercial purpose. *See, e.g., Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 35-37 (1994) (describing the commercial operations of the Port Authority Trans-Hudson Corporation, the product of an interstate compact between New Jersey and New York). But, at the same time, many compacts address purely noncommercial, public interest issues. *See, e.g., Alabama v. Bozeman*, 533 U.S. 146, 148 (2001) (purpose of Interstate Agreement on Detainers to create uniform procedures for holding prisoners in one State for trial in another State); *Dyer*, 341 U.S., at 24 (purpose of Ohio River Valley Water Sanitation Compact to control water pollution).

with certain conditions to remain on parole. To that end, the PPCAA MANUAL provides that the receiving State should remit progress reports to the sending State. *Id.*, at 3.18, §4-103. If the parolee violates his parole conditions, the PPCAA MANUAL sets forth procedures for returning the parolee to the sending State for parole revocation proceedings. *Id.*, at 3.22-3.25, §§4-110 to 4-112. If the parolee completes his parole, the sending State discharges him from supervision. *Id.*, at 3.21, §4-108.

In light of the Compact's operation, the activities of the Texas defendants fall short of the "purposeful availment" requirement. *Hanson* requires that there must be some contact by which the defendant "purposefully avails itself of the privilege of *conducting activities within the forum State*." *Hanson*, 357 U.S., at 253 (emphasis added). It is undisputed that the Texas defendants never entered North Dakota to conduct activities. The Compact makes interstate travel by parole officials unnecessary by ensuring the cooperation of the member States.

It is clear that physical presence is not required for a defendant to conduct activity within the forum State under *Hanson*, but again only in the commercial context. *See Burger King Corp.*, 471 U.S., at 476. Indeed, the Court's commercial-oriented jurisprudence apparently compelled the North Dakota Supreme Court to acknowledge the obvious: "placement of a Texas parolee in North Dakota for supervision is not a commercial transaction." App., at 25a. But while the Court's decisions may establish that defendants directing business activity toward a State's residents from afar are still conducting activity within that State, those cases present circumstances wholly distinct from compact operations.

The North Dakota Supreme Court did not even attempt to analogize compact operations and commercial activities, but instead offered a tautology: "[t]he Texas defendants' affirmative action of asking North Dakota to supervise Lawrence, a Texas parolee, constitutes activity in which they purposely availed themselves of

the privilege of sending Lawrence to North Dakota." *Id.* This statement presents "sending Lawrence to North Dakota" as "conducting activity within the State" under *Hanson.* In fact, by sending Lawrence to North Dakota, the Texas defendants disclaimed conducting any activity in North Dakota by yielding supervision of Lawrence to North Dakota under the Compact.[11] And activity by Lawrence himself could not constitute activity by the Texas defendants, as this Court has held that parolees are not agents of the parole officials who release them. *See Martinez v. California*, 444 U.S. 277, 285 (1980).

After Lawrence arrived in North Dakota, some of the Texas defendants communicated with North Dakota officials and Lawrence regarding his parole status, as required by compact rules. Monitoring Lawrence's parole status, however, is hardly analogous to "a commercial actor's efforts . . . 'purposefully directed' toward residents of another State." *Cf. Burger King Corp.*, 471 U.S. at, 476. The Texas defendants simply were entitled to receive information regarding Lawrence's adherence to his parole conditions.

The North Dakota Supreme Court never identified how the Texas defendants had "invoked the benefits and protections of North Dakota's laws" under *Hanson.* The immediate beneficiary of their activity was Lawrence, who was allowed to live with his sister while on parole. In a larger sense, the intended beneficiary of compact transfers is the general public, in that it serves the public interest to place parolees in the optimal situation for rehabilitation. *See* PPCAA MANUAL, at 2.2.

Any argument that the Texas defendants benefitted by being "relieved" of supervising Lawrence ignores the Compact's function.

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11. "An interstate compact, by its very nature, shifts a part of a state's authority to another state or states . . . ." M. Ridgeway, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM 300 (1971).

States transfer parolees under the Compact to improve parolees' prospects, not to unburden themselves of supervision duties. Indeed, a State may transfer parolees to other States only by assuming the reciprocal burden of supervising parolees transferred from other compact States. Further, to the extent the Texas defendants had a dispute with North Dakota about Lawrence's supervision, their recourse was the Parole and Probation Compact Administrators' Association's regulations and grievance procedures, not North Dakota's laws or courts. *Id.*, at 9.1-9.2.

The Court's "purposeful availment" jurisprudence simply does not speak to the Texas defendants' activities. Rather than force a comparison, the North Dakota Supreme Court offered only a conclusory take on the issue, foregoing any searching analysis. The Court should grant the petition to determine the meaning of "purposeful availment" when the defendants' activity consists of performing noncommercial, public duties under an interstate compact.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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October 28, 2002

APPENDIX

[Filed by Clerk of Supreme Court, June 10, 2002]

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2002 ND 101

Michelle Hansen, Stacey Hanson, and Michelle Hansen, as Personal Representative of the Estates of Gordon and Barbara Erickstad, Plaintiffs and Appellants

v.

Wayne Scott, Ray Parra, Rey Selvera, William H. Brooks, Cathy Doyle, Veronica Ballard, Carl Jeffries, Ethel White, Larry Hermance, Cynthia Lyons, Defendants and Appellees

Robert R. Lawrence, John Doe #1, John Doe #2, John Doe #3, John Doe #4, and John Doe #5, individually, Defendants

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No. 20010195

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Gail H. Hagerty, Judge.

REVERSED AND REMANDED.

Opinion of the Court by Kapsner, Justice.

Timothy Q. Purdon (argued) and Thomas A. Dickson (on brief), Dickson & Purdon, P.O. Box 1896, Bismarck, N.D. 58502-1896, for plaintiffs and appellants.

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Hansen v. Scott

No. 20010195

Kapsner, Justice.

[¶1] Michelle Hansen, individually and as personal representative of the estates of Gordon and Barbara Erickstad, and Stacey Hanson, the Erickstads' daughters, ("daughters") appeal from a partial judgment dismissing for lack of personal jurisdiction their wrongful death, survivorship, and 42 U.S.C. § 1983 claims against employees of the Texas Department of Criminal Justice ("Texas defendants"). We hold the daughters' claims against the Texas defendants state a prima facie tort under N.D.R.Civ.P. 4(b)(2)(C), and the exercise of personal jurisdiction over the Texas defendants would not offend traditional notions of substantial justice, fair play, or due process of law. We reverse and remand for further proceedings.

I

[¶2] The daughters brought wrongful death and survivorship claims against Robert Lawrence, and wrongful death, survivorship, and 42 U.S.C. § 1983 claims against the Texas defendants in an action stemming from the September 16, 1998 murders of Gordon and Barbara Erickstad by Lawrence and Brian Erickstad. See State v. Erickstad, 2000 ND 202, 620 N.W.2d 136. At the time of the murders, Lawrence was a parolee from Texas being supervised in North Dakota under N.D.C.C. ch. 12-56, the Interstate Compact for Out-of-State Parolee Supervision.

[¶3] In May 1997, North Dakota accepted Lawrence, a Texas resident, for parole supervision in North Dakota. In June 1997, Lawrence was released from custody in Texas, and he began living with his sister in Mandan, where he was supervised by North Dakota parole officials under the Interstate Compact. In October 1997, Lawrence was convicted of making a false report to law

enforcement officials in Morton County, and in December 1997, North Dakota parole officials notified Texas parole officials about Lawrence's North Dakota conviction and that a second similar charge and driving under suspension and exhibition driving charges were pending against him. In December 1997, North Dakota parole officials also notified Texas parole officials that Lawrence had moved and his new address was not known. In February 1998, Texas parole officials issued a pre-revocation warrant authorizing North Dakota officials to arrest Lawrence. In February 1998, Lawrence was convicted of making a false report to law enforcement officers in Burleigh County, and he was sentenced to one year in prison with three months suspended. In March 1998, Texas dropped its "hold" and its revocation proceedings against Lawrence because of his North Dakota conviction and sentence. On August 24, 1998, Lawrence was released from prison, but he failed to contact his North Dakota parole officer within 24 hours. On September 11, 1998, North Dakota parole officials informed Texas parole officials that Lawrence had absconded from supervision, and North Dakota was closing its case and recommending Texas issue a warrant for Lawrence's arrest and return to Texas for revocation proceedings. Gordon and Barbara Erickstad were murdered on September 16, 1998.

[¶ 4] The daughters brought wrongful death and survivorship claims against Lawrence. The daughters also brought wrongful death, survivorship, and 42 U.S.C. § 1983 claims against the Texas defendants, alleging Lawrence had an extensive criminal record in Texas dating back to 1989 and

> when providing transfer investigation information to North Dakota Parole and Probation officials, [the Texas defendants] unreasonably and recklessly failed to fully disclose and provide the background

> and prior criminal history of Defendant Robert Lawrence in violation of the applicable standard of care[,]
>
> . . . .
>
> while administering the Interstate Compact agreement between Texas and North Dakota in regards to Defendant Robert Lawrence, [the Texas defendants] unreasonably and recklessly failed to comply with the standard of care in supervising Defendant Robert Lawrence as set forth by the applicable policies and procedures governing supervision of inmates on parole, including but not limited to, the policies and procedures required and developed by the Parole and Probation Compact Administrators' Association[,]
>
> . . . .
>
> [and] in developing and implementing the policies and procedures adopted and utilized by the Texas Department of Criminal Justice for determining when a parolee should be returned from a receiving state due to violations of his or her parole, [the Texas defendants] acted in an unreasonable and reckless manner in violation of the applicable standard of care.

[¶5] The Texas defendants made a special appearance to contest North Dakota's exercise of personal jurisdiction over them. The trial court granted the Texas defendants' motion to dismiss for lack of personal jurisdiction under N.D.R.Civ.P. 4(b)(2)(C), concluding that, although the Texas defendants had sufficient minimum contacts with North Dakota to satisfy due process, the daughters' claims against the Texas defendants did not allege a tort because the

Texas defendants did not take charge of Lawrence under Restatement (Second) of Torts § 319 (1965) and therefore did not have a tort duty to the daughters for Lawrence's criminal acts. The daughters' wrongful death and survivorship claims against Lawrence have not been resolved and are still pending. The trial court granted the daughters' request for certification of the dismissal of the Texas defendants as a final judgment under N.D.R.Civ.P. 54(b), and the daughters appealed.

II

[¶6] The Texas defendants argue the trial court improvidently entered a N.D.R.Civ.P. 54(b) certification. The daughters assert the Texas defendants waived their objection to the Rule 54(b) certification by not opposing the daughters' request for certification in the trial court.

[¶7] We are not bound by a trial court's certification under N.D.R.Civ.P. 54(b), and we may sua sponte review the certification. Mitchell v. Sanborn, 536 N.W.2d 678, 681 (N.D. 1995). Because we may review a Rule 54(b) certification on our own motion, we reject the daughters' claim that the Texas defendants waived their objection to the certification.

[¶8] Rule 54(b), N.D.R.Civ.P., authorizes a trial court to direct entry of a final judgment adjudicating fewer than all of the claims, or the rights and liabilities of fewer than all of the parties upon "express determination that there is no just reason for delay" and "express direction for the entry of judgment." We review a trial court's Rule 54(b) certification under the abuse-of-discretion standard. Nodak Mut. Farm Bur. v. Kosmatka, 2000 ND 210, ¶ 4, 619 N.W.2d 852; Symington v. Walle Mut. Ins. Co., 1997 ND 93, ¶ 5, 563 N.W.2d 400; Sickler v. Kirkwood, 1997 ND 40, ¶ 5, 560 N.W.2d 532, 533; Wyatt v. Adams, 551 N.W.2d 775, 777 (N.D. 1996); Ingalls v. Glass Unlimited, Inc., 529 N.W.2d 872, 873 (N.D. 1995); Gessner v. City of Minot, 529 N.W.2d 868, 870 (N.D.

1995); Bulman v. Hulstrand Const. Co., Inc., 503 N.W.2d 240, 241 (N.D. 1993).

[¶9] The trial court's discretion must be measured against the "interest of sound judicial administration." Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 10 (1980) (quoting Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956)). In Union State Bank v. Woell, 357 N.W.2d 234, 236 (N.D. 1984), we noted an increase in Rule 54(b) certifications and said they should not be routinely granted. We cited Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 364 (3d Cir. 1975), for a non-inclusive list of relevant factors for a trial court to consider in deciding a Rule 54(b) certification:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Woell, at 238.

[¶10] A common thread in our cases reviewing Rule 54(b) certifications is our strong policy against piecemeal appeals, and our aversion to rendering advisory opinions in cases where future developments in the trial court may moot the issues raised for appellate review. See Kosmatka, 2000 ND 210, ¶¶ 10-13, 619

N.W.2d 852; Symington, 1997 ND 93, ¶ 8, 563 N.W.2d 400; Wyatt, 551 N.W.2d at 777; Ingalls, 529 N.W.2d at 873; Gessner, 529 N.W.2d at 870; Bulman, 503 N.W.2d at 241-42.

[¶11] We have held a trial court does not abuse its discretion in granting a Rule 54(b) certification if the issues raised in the appeal will not be mooted by future developments in the trial court. Symington, 1997 ND 93, ¶ 8, 563 N.W.2d 400. In Symington, at ¶ 3, an insured sued his agent and his insurer regarding coverage under a farm property policy. The insured alleged the insurer's farm policy provided coverage for a loss and, alternatively, if the policy did not provide coverage, the agent had negligently failed to procure coverage and had misrepresented that coverage had been provided. Id. The trial court granted partial summary judgment for the insurer, concluding the policy did not provide coverage for the insured's loss. Id. at ¶ 4. The trial court certified the partial summary judgment on the claim against the insurer under N.D.R.Civ.P. 54(b) without deciding the claim against the agent. We concluded the trial court did not abuse its discretion in granting the Rule 54(b) certification:

> No matter how those remaining contingent claims against [the agent] are decided, the coverage issues raised in this appeal will always need to be resolved and will never be mooted by future developments in the trial court. See Wyatt, 551 N.W.2d at 777; Gessner, 529 N.W.2d at 871. Instead, the converse is true. A decision on [the insured's] remaining contingent claims against [the agent] will be unnecessary if there is coverage under [the insurer's] policy. In this posture, our appellate resolution of the coverage issue now will not result in an advisory opinion. Under the framework of Woell, we conclude the trial court did not abuse its discretion in granting Rule 54(b) certification to

> allow appellate determination of the coverage issue before further proceedings on the contingent claims against [the agent].

Symington, at ¶ 8.

[¶12] Here, the substantive issues in the daughters' lawsuit involve the determination and allocation of fault for their parents' deaths under our modified comparative fault statutes, N.D.C.C. ch. 32-03.2. Those provisions were enacted in 1987 and significantly revised tort liability in North Dakota, shifting the focus from traditional tort doctrines to the singular inclusive concept of "fault." See Rodenburg v. Fargo-Moorhead Young Men's Christian Ass'n, 2001 ND 139, ¶ 25, 632 N.W.2d 407; Haff v. Hettich, 1999 ND 94, ¶ 14, 593 N.W.2d 383; Hurt v. Freeland, 1999 ND 12, ¶ 20, 589 N.W.2d 551; Stewart v. Ryan, 520 N.W.2d 39, 45 (N.D. 1994). Under N.D.C.C. § 32-03.2-01, fault includes "acts or omissions that are in any measure negligent or reckless towards the person or property of the actor or others, or that subject a person to tort liability." Section 32-03.2-02, N.D.C.C. provides:

> Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. The court shall then reduce the amount of such damages in proportion to the amount of fault

> attributable to the person recovering. When two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable only for the amount of damages attributable to the percentage of fault of that party, except that any persons who act in concert in committing a tortious act or aid or encourage the act, or ratifies or adopts the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault. Under this section, fault includes negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, failure to avoid injury, and product liability, including product liability involving negligence or strict liability or breach of warranty for product defect.

[¶13] Under N.D.C.C. §§ 32-03.2-01 and 32-03.2-02, a negligent tortfeasor's conduct is compared with an intentional tortfeasor's conduct, and absent "in concert" action, liability is several, not joint, with each tortfeasor liable only for the amount of fault allocated to that tortfeasor. See Rodenburg, 2001 ND 139, ¶ 26, 632 N.W.2d 407. Section 32-03.2-02, N.D.C.C., authorizes the trial court to instruct the jury to "find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury." See Haff, 1999 ND 94, ¶¶ 2-3, 15-17, 593 N.W.2d 383. That language contemplates an "empty chair" defense, which specifically permits an allocation of fault to each person who contributed to an injury even though that person may not be a party to the action. See V. Schwartz, Comparative Negligence § 15-5(a) (3d ed. 1994). See also Cornell Harbison Excavating, Inc. v. May, 546 N.E.2d 1186, 1187 (Ind. 1989) (in order for culpable nonparty

to be assigned fault, nonparty must be subject to liability by civil action); Brown v. Keill, 580 P.2d 875, 876 (Kan. 1978) (even though parties cannot be joined formally as litigants or held legally responsible for proportionate fault, statute imposes liability based on proportionate fault of all parties to the occurrence which gave rise to the injuries and damages); Lines v. Ryan, 272 N.W.2d 896, 902-03 (Minn. 1978) (in submitting comparative fault to jury, trial court must submit names of all persons whose conduct could be found to be negligent and contributing as a cause to the plaintiff's injury or to the accident); Kirby Bldg. Syss. v. Mineral Exploration Co., 704 P.2d 1266, 1272 (Wyo. 1985) (jury must consider negligence not only of all the parties but all the participants in the transaction which produced the injuries sued upon).

[¶14] Those authorities suggest an "empty chair" defense is applicable when there is, or may be, a viable theory for assessing fault against a nonparty, i.e., a "person" under N.D.C.C. § 32-03.2-02, but for some reason that person is not a party to the lawsuit or recovery is not permitted against that person. Our cases about potential mootness under N.D.R.Civ.P. 54(b) suggest an analogous principle. See Gessner, 529 N.W.2d at 869-70 (improper service of process on one defendant); Ingalls, 529 N.W.2d at 872-73 (same); Bulman, 503 N.W.2d at 241-42 (sovereign immunity defense).

[¶15] As this appeal is presently postured, the trial court has ruled that the Texas defendants had no duty to the daughters, and that the daughters' allegations against the Texas defendants do not subject them to tort liability. The Texas defendants therefore can not be said to have "contributed to the injury" within the meaning of N.D.C.C. § 32-03.2-02 based upon the trial court's ruling on the issue of duty. Although Lawrence may be entitled to raise an "empty chair" defense against Brian Erickstad, in this posture Lawrence cannot raise an empty chair defense against the Texas defendants. Any evidence about the Texas defendants' potential liability would be irrelevant, and the trial court would not be

required to instruct the jury to determine a percentage of fault attributable to the Texas defendants. In this posture, no allocation of fault to the Texas defendants could occur, and a determination that Lawrence, or Lawrence and Brian Erickstad, were 100 percent at fault without a consideration of the potential fault of the Texas defendants would not render moot issues about the Texas defendants' potential fault. Under those circumstances, any personal jurisdiction issues stemming from resolution of the Texas defendants' duty will be present regardless of the outcome of the claims against Lawrence and will not be mooted or made advisory by future developments in the trial court. See Symington, 1997 ND 93, ¶ 8, 563 N.W.2d 400. We therefore conclude the trial court did not abuse its discretion in certifying the dismissal of the Texas defendants for lack of personal jurisdiction as final under N.D.R.Civ.P. 54(b).

III

[¶16] Under N.D.R.Civ.P. 4(b)(4), a court of this state may acquire personal jurisdiction over any person by service of process as provided in Rule 4, or by a voluntary general appearance. Rule 4(d)(3), N.D.R.Civ.P., provides methods for service of process on any person located outside the state if that person is subject to the personal jurisdiction of the courts of this state. We have said N.D.R.Civ.P. 4(b)(2) authorizes North Dakota courts to exercise personal jurisdiction over nonresident defendants to the fullest extent permitted by due process, and requires a two-prong determination for resolving the question of personal jurisdiction over nonresident defendants. Auction Effertz, Ltd. v. Schecher, 2000 ND 109, ¶ 6, 611 N.W.2d 173; Hust v. Northern Log, Inc., 297 N.W.2d 429, 431 (N.D. 1980). First, the requirements of one of the applicable subparagraphs of N.D.R.Civ.P. 4(b)(2) must be satisfied, and second, the nonresident must have sufficient minimum contacts with North Dakota so the exercise of personal jurisdiction does not offend traditional notions of substantial justice,

fair play, or due process. Rodenburg, 2001 ND 139, ¶ 15, 632 N.W.2d 407; Schecher, at ¶ 6; Hust, at 431.

[¶17] The parties agree the basis for claiming personal jurisdiction over the Texas defendants is N.D.R.Civ.P. 4(b)(2)(C), which provides:

> (b) Jurisdiction Over Person.
>
> . . . .
>
> (2) Personal Jurisdiction Based Upon Contacts. A court of this state may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person's having such contact with this state that the exercise of personal jurisdiction over the person does not offend against traditional notions of justice or fair play or the due process of law, under one or more of the following circumstances:
>
> . . . .
>
> (C) committing a tort within or without this state causing injury to another person or property within this state;

A

[¶18] Rule 4(b)(2)(C), N.D.R.Civ.P., authorizes the exercise of personal jurisdiction over a person who commits a tort within or without the state causing injury to another person or property within this state. In order to establish jurisdiction under N.D.R.Civ.P. 4(b)(2)(C), a plaintiff need not prove a defendant committed a tort by a preponderance of evidence; rather, the plaintiff satisfies the burden as to the first prong of the personal jurisdiction test by establishing a prima facie cause of action. Falkirk Mining Co. v.

Japan Steel Works, Ltd., 906 F.2d 369, 373 (8th Cir. 1990). See also Schecher, 2000 ND 109, ¶ 6, 611 N.W.2d 173 (under N.D.R.Civ.P. 4(b)(2)(A), transacting any business in this state given expansive meaning).

[¶19] In Falkirk, 906 F.2d at 373, the Eighth Circuit Court of Appeals considered a personal jurisdiction issue under N.D.R.Civ.P. 4(b)(2)(C) in the context of a plaintiff's allegation that a foreign corporation's negligent casting and welding of a cam caused the cam to crack and damage a dragline in North Dakota. The court said "[w]ithout deciding whether North Dakota would in fact permit [the plaintiff] to recover damages in tort for the failure of the cam, we hold that the North Dakota long-arm statute authorizes the exercise of jurisdiction [over the defendant] because [the plaintiff] has alleged a prima facie cause of action in tort sufficient to bring [the defendant] within the ambit of N.D.R.Civ.P. 4(b)(2)(C)." Id. The court expressed no opinion about whether North Dakota law would permit the plaintiff to recover damages in tort for the cracking of the cam itself, or whether North Dakota law would limit the plaintiff to contract remedies. Id. at n.9.

[¶20] In Adden v. Middlebrooks, 688 F.2d 1147, 1154-56 (7th Cir. 1982), the Seventh Circuit Court of Appeals considered an Illinois federal district court's exercise of personal jurisdiction over nonresident Louisiana prison officials in a diversity action alleging the officials were liable for the conduct of Louisiana prison escapees who killed a person in Illinois. The court said Illinois law considered a tort to be committed where the injury occurred and recognized Illinois' long-arm statute, which authorized personal jurisdiction for the commission of tortious acts within the state, was intended to extend jurisdiction over nonresidents to the extent permitted by due process. Id. at 1155. Although the court ultimately concluded the Louisiana officials' contacts with Illinois were insufficient to satisfy due process under the minimum contacts prong of the personal jurisdiction framework, the court said because

the victim's death occurred in Illinois, the tortious act occurred there and the plaintiff's wrongful death claim fell within the reach of the Illinois long-arm statute. Id.

[¶21] In Hodgson v. Mississippi Dep't of Corr., 963 F. Supp. 776, 795-97 (E.D. Wis. 1997) a Wisconsin federal district court concluded it did not have personal jurisdiction over Mississippi prison officials for a murder in Wisconsin by a Mississippi parolee in Wisconsin under the Interstate Compact for Out-of-State Parolee Supervision. The district court rejected the plaintiff's claim for personal jurisdiction under:

> subsection 801.05(3) of Wisconsin's long-arm statute, which provides that Wisconsin can exercise personal jurisdiction "[i]n any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the Defendant." [The plaintiff] contends that the Defendants' failure to warn Wisconsin authorities about [the parolee] caused [the plaintiff's] loss and that this omission occurred in Wisconsin. However, he has failed to cite any legal authority for his strained interpretation of this subsection. Any failure to warn or to comply with the Uniform Act for Out-of-State Parolee Supervision on the part of Lucas and Bennett would have occurred in Mississippi, so subsection 801.05(3) does not authorize personal jurisdiction over them. See Lincoln v. Seawright, 104 Wis.2d 4, 13, 310 N.W.2d 596, 600-01 (1981) (failure to warn about vicious dog shipped to Wisconsin occurred in sending state).

Hodgson, 963 F. Supp. at 796.

[¶22] The rationale of Hodgson is not applicable to this case, because N.D.R.Civ.P. 4(b)(2)(C) applies to "committing a tort within or without this state causing injury to another person or property within this state," while the Wisconsin long-arm provision applies to torts "arising out of an act or omission within" Wisconsin. Hodgson, 963 F. Supp. at 796. See also Nelson v. Bulso , 149 F.3d 701, 702 (7th Cir. 1998) (holding Tennessee lawyer did not commit any acts relevant to alleged torts of malicious prosecution, abuse of process, or defamation within Wisconsin).

[¶23] Both Falkirk and Adden apply a deferential review to whether a complaint states a prima facie case for purposes of a state's long-arm statute. In analyzing a personal jurisdiction issue, we have also said a court must look at the facts alleged in the complaint in the light most favorable to the nonmoving party. Rodenburg, 2001 ND 139, ¶ 17, 632 N.W.2d 407. See Schecher, 2000 ND 109, ¶ 6, 611 N.W.2d 173 (expansive interpretation of transacting any business in this state under N.D.R.Civ.P. 4(b)(2)(A)) Cf. Rose v. United Equitable Ins. Co., 2001 ND 154, ¶ 10, 632 N.W.2d 429 (construing complaint in light most favorable to plaintiff on motion to dismiss for failure to state claim). Moreover, in diversity cases, many federal courts have held that when a state's long-arm statute confers jurisdiction to the fullest extent permitted by due process, the two-part test for deciding personal jurisdiction collapses into the single question of whether due process would be violated by the exercise of personal jurisdiction over a nonresident defendant. Oriental Trading Co., Inc. v. Firetti, 236 F.3d 938, 943 (8th Cir. 2001); IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 259 (3d Cir. 1998); Aristech Chem. Int'l Ltd. v. Acrylic Fabricators Ltd., 138 F.3d 624, 627 (6th Cir. 1998); Stover v. O'Connell Assocs., Inc., 84 F.3d 132, 135-36 (4th Cir. 1996); Sawtelle v. Farrell, 70 F.3d 1381, 1388 (1st Cir. 1995); Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610,

612 (8th Cir. 1994); Bell Paper Box, Inc. v. U.S. Kids, Inc., 22 F.3d 816, 818 (8th Cir. 1994); Ruston Gas Turbines, Inc. v. Donaldson Co., Inc., 9 F.3d 415, 418 (5th Cir. 1993). See 4 Wright & Miller, Federal Practice and Procedure § 1068 p. 588 (2002). We have said N.D.R.Civ.P. 4(b)(2), was intended to authorize North Dakota courts to exercise personal jurisdiction over nonresident defendants to the fullest extent permitted by due process. Schecher, at ¶ 6; Hust, 297 N.W.2d at 431.

[¶24] Here, the daughters' complaint alleges claims against the Texas defendants for wrongful death, survivorship, and constitutional violations under 42 U.S.C. § 1983. The daughters allege the Texas defendants unreasonably and recklessly failed to fully disclose Lawrence's background and extensive criminal history when providing transfer information to North Dakota officials, the Texas defendants unreasonably and recklessly failed to comply with the appropriate standard of care under the applicable policies and procedures governing supervision of parolees, and the Texas defendants acted in an unreasonable and reckless manner in developing and implementing policies and procedures for determining when a parole violator should be returned from a receiving state to Texas. The daughters allege the Texas defendant's conduct proximately caused the deaths of Gordon and Barbara Erickstad, which occurred in North Dakota. Under these allegations and in this posture, the daughters' wrongful death and survivorship claims against the Texas defendants are sufficient to allege prima facie torts[1] within or without this state causing injury

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1. The trial court decided the daughters' allegations did not state a claim in tort, because the Texas defendants did not take charge of Lawrence within the meaning of Restatement (Second) of Torts § 319 (1965) and therefore did not have a tort duty for Lawrence's criminal acts. The parties have framed the issue as whether North Dakota law imposes a tort duty on parole officials. Relying on Taggart v. State, 822

to another person within this state under N.D.R.Civ.P. 4(b)(2)(C). See Adden, 688 F.2d at 1155. We must therefore consider whether the exercise of personal jurisdiction over the Texas defendants comports with due process.

B

[¶25] The Texas defendants argue the trial court erred in deciding they had sufficient minimum contacts with North Dakota for the exercise of personal jurisdiction over them. They argue they were not required to file a cross-appeal to preserve this issue for review.

P.2d 243 (Wash. 1992), the daughters argue North Dakota law should impose a duty on parole officials charged with the parole of dangerous criminals like Lawrence. Relying on the Restatement (Second) of Torts §§ 315 and 319 (1965) and the majority view expressed in cases like Schmidt v. HTG, Inc., 961 P.2d 677 (Kan. 1998), the Texas defendants respond North Dakota law does not recognize a tort duty in this case because parole officials do not take charge of parolees within the meaning of § 319.

However, a tort duty may be articulated in broader terms than the parties have argued. Under N.D.C.C. § 9-10-01, "[e]very person is bound without contract to abstain from injuring the person or property of another or infringing upon any of his rights." See Dinger v. Strata Corp., 2000 ND 41, ¶ 16, 607 N.W.2d 886. Section 9-10-06, N.D.C.C., provides "[e]veryone is responsible . . . for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person." See Dinger, at ¶ 16. "Every person has a duty to act reasonably to protect others from harm." Barsness v. General Diesel & Equip. Co., Inc., 383 N.W.2d 840, 845 n.5 (N.D. 1986).

Here, this case is in the posture of a motion to dismiss for lack of personal jurisdiction, and we hold only that the daughters' claims allege prima facie torts under N.D.R.Civ.P. 4(b)(2)(C). In this posture, any determination about the extent of the Texas defendants' duty, the interplay of discretionary and ministerial acts, and any possible immunity defenses is premature.

[¶26] In Stewart v. North Dakota Workers Comp. Bur., 1999 ND 174, ¶ 37, 599 N.W.2d 280(citations omitted), we said:

> when the judgment below provides all of the relief sought by the appellee, it is unnecessary to file a cross-appeal. In such a case, the appellee may attempt to save the judgment by urging any ground asserted in the trial court. An appellee who fails to cross-appeal is only precluded from seeking greater relief than she received in the trial court.

[¶27] The relief granted by the trial court was a dismissal for lack of personal jurisdiction, which was the relief sought by the Texas defendants. Under Stewart, the Texas defendants are seeking the same relief, a dismissal for lack of personal jurisdiction, under their minimum contacts argument, and their failure to file a cross-appeal does not preclude them from now arguing the minimum contacts issue.

[¶28] The Texas defendants argue the exercise of personal jurisdiction over them violates due process, because they have insufficient contacts with North Dakota and the maintenance of this action against them offends traditional notions of fair play and substantial justice. They argue the minimum contacts concept of placing a product in the stream of commerce does not apply to their activities, which are mandated by the Interstate Compact for Out-of-State Parolee Supervision.

[¶29] Consistent with due process, a state may exercise personal jurisdiction over a nonresident defendant who is not present within the state when the nonresident defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). In Hanson v. Denckla, 357 U.S. 235, 253 (1958), the United States

Supreme Court said in order to exercise personal jurisdiction, "it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." In World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980), the Court explained a critical part of the due process analysis is whether a nonresident defendant's conduct and connection with the forum state is such that the defendant should reasonably anticipate being haled into court there.

[¶30] In Lumber Mart, Inc. v. Haas Intern. Sales & Serv., Inc., 269 N.W.2d 83, 88 (N.D. 1978), we identified five factors for assessing personal jurisdiction over a nonresident defendant: (1) the nature and quality of a nonresident defendant's contacts with the forum state; (2) the quantity of the nonresident defendant's contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the forum state's interest in providing a forum for its residents; and (5) the convenience of the parties. See also Falkirk, 906 F.2d at 374.

[¶31] In Adden, 688 F.2d at 1155-56, the Seventh Circuit Court of Appeals held an Illinois federal district court did not have personal jurisdiction over nonresident Louisiana prison officials in a diversity action alleging the prison officials were liable in tort for the criminal acts of two Louisiana prison escapees who killed a person in Illinois. The court said the Louisiana prison officials:

> did not purposefully conduct any activities within Illinois nor could they reasonably anticipate being forced to defend a negligence suit there. An escaped prisoner might flee to virtually any state and commit a tortious act there. This is especially true when six weeks have elapsed between the time of escape and the commission of the tort. The fact that apparently one of the two escapees in this case

> was originally from Illinois does not alter this analysis. If it did, we would be concluding that Department of Corrections officials should expect to be sued in any state which was at some point the "home" of a person incarcerated in Louisiana.

Id. at 1156.

[¶32] In Perez Bustillo v. State, 718 S.W.2d 844, 847 (Tex. Ct. App. 1986), the Texas Court of Appeals reached a similar result regarding the exercise of personal jurisdiction over nonresident Louisiana prison officials for a Louisiana prison escapee's automobile accident in Texas:

> The evidence presented at the hearing shows that [the prison officials] did not purposefully conduct any activities within the State of Texas. Any tortious acts on their part were not such that they could reasonably anticipate being forced to defend a negligence suit in Texas. See Adden v. Middlebrooks, 688 F.2d 1147 (7th Cir. 1982). We do not believe that [the prison officials] could reasonably forsee being haled into court in Texas under these circumstances. An escaped prisoner might likely commit a tortious act in any state to which he might flee. We do not believe that, merely because Texas and Louisiana have common borders and reciprocal parole and extradition agreements, a nexus exists between these contacts and the tort allegedly committed by [the escapee] in this case. [The prison officials] have shown that no minimum contacts exist between them and the forum state.

¶33] In Hodgson, 963 F. Supp. at 795-97, a Wisconsin federal district court concluded it did not have personal jurisdiction over nonresident Mississippi officials under a long-arm provision

authorizing jurisdiction over nonresident defendants who were engaged in "substantial and not isolated activities" in Wisconsin. The court rejected the plaintiff's claim that evidence of twenty-one requests for transfers of parolees from Mississippi to Wisconsin represented "substantial and not isolated activities" in Wisconsin:

> The Plaintiff has presented nothing to show that Defendants Lucas or Bennett personally handled any of the twenty-one requests to transfer prisoners from Mississippi to Wisconsin. Even if they had, these requests cannot be characterized as acts by which the Defendants purposefully availed themselves of the privilege of conducting activities within Wisconsin or acts which should have reasonably led them to anticipate being haled into court here. See World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L .Ed. 2d 490 (1980); Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239-40, 2 L. Ed. 2d 1283 (1958). Based on this showing, the court concludes that the Plaintiff 's attempt to establish minimum contacts between Lucas, Bennett and Wisconsin is inadequate and that personal jurisdiction over Lucas and Bennett is not available under subsection 801.05(1)(d). See Adden v. Middlebrooks, 688 F.2d 1147, 1156 (7th Cir. 1982) (concluding that the federal court in Illinois did not have personal jurisdiction over Louisiana's Director of Department of Corrections or the Superintendent of
>
> > Louisiana Correctional and Industrial School who were sued for a wrongful death committed in Illinois by two escaped prisoners from Louisiana).

Hodgson, 963 F. Supp. at 796.

[¶34] We are not persuaded by the Hodgson court's reliance on Adden, a case involving a prison escapee, to support its conclusion that Mississippi parole officials did not conduct activities in Wisconsin. Hodgson, 963 F. Supp. at 796. In our view, there is a significant difference between contacts in the case of a prison escapee and contacts between parole officials in a sending and in a receiving state regarding supervision of a parolee in a receiving state. As Adden recognized in the context of a prison escapee, the nonresident Louisiana officials "did not purposefully conduct any activities within Illinois nor could they reasonably anticipate being forced to defend a negligence suit there. An escaped prisoner might flee to virtually any state and commit a tortious act there." Adden, 688 F.2d at 1156.

[¶35] Here, pursuant to Lawrence's request, the Texas defendants specifically asked North Dakota authorities to accept Lawrence for parole supervision. Cf. Schecher, 2000 ND 109, ¶ 8, 611 N.W.2d 173 (holding nonresident conducted business in this state when he initiated contact by phone call to a North Dakota business and ultimately reached a contractual agreement to have the business provide agency services on nonresident's behalf). North Dakota consented to Lawrence residing here while on parole in Texas. Under the Interstate Compact for Out-of-State Parolee Supervision, Texas, as a sending state, was authorized to permit Lawrence to reside in North Dakota, a receiving state, if (1) Lawrence was a resident of or had family residing within North Dakota and could obtain employment in North Dakota, or (2) North Dakota consented to Lawrence being sent here. N.D.C.C. § 12-56-01(1)(a) and (b). Lawrence was not a resident of North Dakota for purposes of the compact, see N.D.C.C. § 12-56-02, and it is not clear the degree of discretion that North Dakota had to accept Lawrence from Texas. The record indicates Lawrence's supervision plan indicated he would live with a sister in Mandan, but the record does not reflect Lawrence's employment prospects. The record also reflects North

Dakota consented to Lawrence residing here while on parole. Whether North Dakota may have had discretion to refuse to accept Lawrence is not necessarily controlling, however, because, assuming the truth of the allegations in the daughters' complaint, the Texas defendants unreasonably and recklessly failed to disclose Lawrence's background and extensive criminal history when providing transfer information to North Dakota. The alleged lack of information provided to North Dakota parole officials could affect their degree of supervision once Lawrence arrived in North Dakota. See N.D.C.C. § 12-56-01(2) ("receiving state will assume the duties of . . . supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.")

[¶ 36] Assuming the truth of the allegations in the complaint, the Texas defendants effectively sent a dangerous parolee to North Dakota without fully disclosing his dangerous propensities. See Rodenburg, 2001 ND 139, ¶¶ 19-22, 632 N.W.2d 407 (authorizing exercise of personal jurisdiction over nonresident who supplied gun to person who traveled to North Dakota and used gun in an attempted murder). Cf. Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 406-10 (N.D. 1994) (holding manufacturer has post-sale duty to warn about dangers associated with products); McLean v. Kirby Co., 490 N.W.2d 229, 233-34 (N.D. 1992) (holding manufacturer has duty to customer for rape by manufacturer's independent distributer). The Texas defendants' affirmative action of asking North Dakota to supervise Lawrence, a Texas parolee, constitutes activity in which they purposely availed itself of the privilege of sending Lawrence to North Dakota. After Lawrence arrived in North Dakota, there were continuing contacts between Texas and North Dakota regarding Lawrence's activities in North Dakota. The Texas defendants' contacts with North Dakota stem from their parole relationship with Lawrence, the

alleged instrumentality of the daughters' claims. The sending state, Texas, and the receiving state, North Dakota, operated with a clear understanding that Lawrence would be permitted to live in North Dakota while serving his Texas parole. The Texas defendants' alleged conduct and activities with North Dakota regarding Lawrence are such that they could reasonably anticipate being haled into court in North Dakota.

[¶37] Although the placement of a Texas parolee in North Dakota for supervision is not a commercial transaction, the Texas defendants unequivocally directed activity regarding Lawrence to North Dakota. See Rodenburg, 2001 ND 139, ¶¶ 18-19, 632 N.W.2d 407. The daughters' claims arise out of Lawrence's actions and the Texas defendants' contacts with North Dakota, and we reject the Texas defendants' claim that contacts mandated by the Interstate Compact should not be considered for purposes of the exercise of personal jurisdiction. Rather, we believe those contacts militate in favor of the exercise of personal jurisdiction. Viewing the allegations in the complaint in the light most favorable to the daughters, we conclude the exercise of personal jurisdiction over the Texas defendants does not offend traditional notions of substantial justice, fair play, or due process of law.

[¶38] We reverse the dismissal of the daughters' action against the Texas defendants for lack of personal jurisdiction, and we remand for proceedings consistent with this opinion.[2]

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2. Our decision is specifically limited to the proceedings in their current procedural posture, and we express no opinion about the parameters of any possible duty owed to the daughters by the Texas defendants, the interplay of any mandatory or discretionary acts by the Texas defendants, and any defenses that may be available to them.

[¶39] /s/Carol Ronning Kapsner
/s/Mary Muehlen Maring
/s/William A. Neumann
/s/Bruce Bohlman, D.J.

I concur in the result
Gerald W. VandeWalle, C.J.

[¶40] The Honorable Bruce E. Bohlman, D.J., sitting in place of Sandstrom, J., disqualified.

[Entered May 25, 2001]

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF BURLEIGH Case No. 00-C-2567

Michelle Hansen, Stacey Hanson, and Michelle Hansen, as Personal Representative of the Estates of Gordon and Barbara Erickstad,

Plaintiffs

vs.

Wayne Scott, Ray Parra, Rey Selvera, William H. Brooks, Cathy Doyle, Veronica Ballard, Carl Jefferies, Gerald Garrett, Larry Hermance, Rissie Owens, Diana Woltersdorf, Ethel White and Cynthia Lyons,

and Robert R. Lawrence,

Defendants.

OPINION AND ORDER

The Parties

The plaintiffs in this matter are the daughters of Gordon and Barbara Erickstad (the Erickstads). The Erickstads were murdered in their home in Bismarck, North Dakota, on September 16, 1998. The plaintiffs brought ths wrongful death and survivorship action against the defendants. All of the defendants except Robert

Lawrence are employees of the State of Texas and are alleged to have been involved in the parole of Lawrence.

The plaintiffs allege that in May of 1997, the State of Texas requested the State of North Dakota to accept Lawrence for supervision under section 12-56-01 of the North Dakota Century Code which is the Interstate Compact for Out-of-State Parolee Supervision. The plaintiffs allege the Texas defendants failed to disclose and provide Lawrence's background information and criminal history and Lawrence was accepted for supervision. The plaintiffs further allege the Texas defendants failed to take appropriate action when notified Lawrence had violated the terms of his parole.

On September 11, 1998, Gordon and Barbara Erickstad were murdered and Lawrence was one of the individuals convicted of the murders.

Procedural Background

The original complaint in this matter was served on several defendants in early September of 2000. On October 18, 2000, the defendants who are employees of the Texas Department of Corrections entered a special appearance to contest personal jurisdiction and filed a motion to dismiss the complaint under Rule 12(b)(ii) of the North Dakota Rules of Civil Procedure. The Texas defendants attached an affidavit as an attachment to their brief in support of the motion to dismiss and a motion to stay discovery.

On October 31, 2000, the plaintiffs filed a brief in opposition to the motion to dismiss and a motion to strike the affidavit. Plaintiffs suggested the inclusion of the affidavit in support of the motion to dismiss changed the motion to a motion for summary judgment and the plaintiffs argued they were entitled to discovery prior to a ruling on a motion for summary judgment.

On November 18, 2000, Judge Vukelic issued an order indicating the motion to dismiss would be treated as a motion for summary judgment and he allowed discovery. (*I do not agree the motion should be treated as a summary judgment motion. I would have distinguished between a motion brought under Rule 12(b)(ii) and motions brought under Rule 12(b)(v). The authority on which it was determined that the filing of an affidavit would convert a motion to a motion to summary judgment is based on cases involving motions brought under Rule 12(b)(v).*) On February 16, 2001, after discovery had been done, the plaintiffs served the first amended complaint.

Personal Jurisdiction

The Texas defendants have requested the Court dismiss the action against them arguing lack of personal jurisdiction under Rule 12(b)(ii) of the North Dakota Rules of Civil Procedure.

Under Rule 4(b)(4) of the Rules of Civil Procedure, North Dakota courts can acquire personal jurisdiction over any person through service of process as provided in Rule 4 or by voluntary general appearance. Rule 4(d)(3) allows service on any person located outside the state if that person is subject to the personal jurisdiction of the courts in this state.

The parties agree the basis for personal jurisdiction in this case would be Rule 4(b)(2)(C) of the Rules of Civil Procedure, which provides, in part:

(b) Jurisdiction Over Person. . .

(2) Personal Jurisdiction Based Upon Contacts. A court of this state may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person's having such contact with this state

> that the exercise of personal jurisdiction over the person does not offend against traditional notions of justice or fair play or the due process of law, under one or more of the following circumstances:. . .
>
> (C) committing a tort within or without this state causing injury to another person or property within this state;

The parties also agree that even if Rule 4(b)(2)(C) provides a basis for assertion of personal jurisdiction, the constitution requires minimum contacts between the Texas defendants and the State of North Dakota in order to gain personal jurisdiction over the Texas defendants.

In determining whether personal jurisdiction exits, the Court is to conduct an analysis on a case by case basis considering the facts of each case. ***See, Hebron Brick Co. v. Robinson Brick & Tile Co.***, 234 N.W. 2d 250, 257 (N.D. 1975). In ***Hust v. Northern Log, Inc.***, 297 N.W.2d 429, 431 (N.D. 1980), the North Dakota Supreme Court explained:

> The determination that must be made in resolving the question of personal jurisdiction is two-fold. First, it must be determined if the requirements of the applicable subparagraphs contained in Rule 4(b)(2), N.D.R.Civ.P., have been satisfied. Secondly, it is necessary to determine whether or not the nonresident party has had such contact with the forum State that the exercise of personal jurisdiction over the nonresident does not offend against the traditional notions of justice and fair play under the concept of due process of law.

The Due Process clause of the Constitution places two restrictions on exercise of personal jurisdiction. **See, *Hust***, at 431. Parties directly affected by the court action must receive fair and

adequate notice of the action. **See,** ***Larson v. Dunn,*** 474 N.W. 2d 34, 38-89 (N.D. 1991). And there must be minimum contacts between the parties and the forum state so assumption of jurisdiction is fair and reasonable. ***See, International Shoe Co. v. State of Washington,*** 326 U.S. 310, 316 (1945); ***see also, Auction Effertz, Ltd. v. Schecher,*** 2000 ND 109, 611 N.W.2d 173.

In this case, the defendants have received proper out-of-state service under Rule 4(d)(3) and have adequate notice of the action. Based on the allegations of the complaint, it could be concluded the Texas defendants have had minimum contacts with the State of North Dakota so assumption of jurisdiction is fair and reasonable.

Tort Not Alleged

The Texas defendants argue, however, the allegations against them do not allege a tort. The only basis for the torts alleged by the plaintiffs against the Texas defendants can be fairly described as a negligent failure to revoke parole or negligent parole supervision. Because Rule 4(b)(2)(C) requires that in order to assert personal jurisdiction, there must be a showing that a person has committed a tort causing injury to another person or property in this state, the Court must consider the allegations of the complaint and whether a tort is alleged.

Unfortunately, there is no controlling authority for a decision on the issue of whether a tort is alleged. I conclude that allegations of negligence in parole decisions do not state a claim in tort. The cases which have been cited reaching this conclusion are persuasive and well-reasoned. The courts which have refused to find such negligence to be a cause of action correctly leave responsibility for criminal conduct on parties who commit crimes.

In ***Johnson v. State,*** 553 N.W. 2d 40, 47-78 (Minn. 1996), a parolee was released and ordered to report to a halfway house. The parolee failed to so, instead going on an eight-day crime spree

which included a rape and murder. A fugitive warrant was not issued for eight days and the parolee was not arrested for 12 days. The Minnesota Supreme Court ruled there was no tort cause of action and held:

> In reaching this result, we also recognize that imposing liability would undermine public policy clearly manifested by the legislature in the statutes of this state providing for the release of parolees into the community. While supervised release is a complex policy that is sometimes fraught with danger for innocent citizens, it remains a policy choice of the legislature that is protected from judicial second-guessing. (citation omitted)

In the present case, the legislature has made the policy decision to enter into the Interstate Compact for Out-of-State Parolee Supervision, Section 12-56-01 of the North Dakota Century Code.

In ***Small v. McKennan Hosp.***, 403 N.W. 2d 410 (S.D. 1987), the South Dakota Supreme Court found there is no duty of parole officers to victims of crimes by parolees they supervise. The survivor of a parolee's victim sued several people, including a parole officer, for negligent parole supervision. The court relied on the Restatement (Second) of Torts § 315 and quoted § 319 of the Restatement (Second) of Torts (1965), which states:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

The South Dakota Supreme Court held that the parole officer did not take charge of the parolee by supervising his parole even though the parolee was on maximum supervision status. The Court noted the parolee was not housed in prison, was employed and was not

supervised on a daily basis. The Court held that the supervision did not rise to the level of taking charge and the parole officer did not have the type of relationship with the parolee which would give him a duty towards the third party victim.

In ***Schmidt v. HTG, Inc.***, 961 P. 2d 677, 687 (Kansas 1998) the Kansas Supreme Court considered the relationship between a parole officer and a parolee and held there was no special relationship giving rise to a duty to the victim of a parolee's crimes. The Court held:

> [W]e reject this overbroad construction which escalates the State's responsibility to that of virtual guarantor of the safety of each and every one of its citizens from illegal and unlawful actions of every parolee or person released from custody under any type or kind of supervision.

On the other hand, there are cases which have held parole officers have a special relationship with their parolees which creates a duty to persons injured by the parolee. ***See, Taggart v. State***, 822 P. 2d 243 (Wash. 1992); ***Sterling v. Bloom***, 723 P. 2d 755 (Idaho 1986)

Conclusion

Because the Court concludes the plaintiffs have not alleged a tort against the Texas defendants, the Texas defendants' motion to dismiss under Rule 12 (b)(ii) of the Rules of Civil Procedure is **GRANTED.**

Dated May 24, 2001.

BY THE COURT:

/s/ Gail Hagerty
Gail Hagerty
District Judge

[Entered July 16, 2001]

STATE OF NORTH DAKOTA — IN THE DISTRICT COURT

COUNTY OF BURLEIGH — SOUTH CENTRAL JUDICIAL DISTRICT

Michelle Hansen, Stacey Hanson, and Michelle Hansen, as Personal Representative of the Estates of Gordon and Barbara Erickstad,	}	Civil No. 08-00-C-02567
Plaintiffs	}	**ORDER**
v.	}	
Wayne Scott, Ray Parra, Rey Selvera, William H. Brooks, Cathy Doyle, Veronica Ballard, Carl Jeffries, Ethel White, Larry Hermance, Cynthia Lyons, Robert R. Lawrence, John Doe #1 John Doe #2, Joe Doe #3, John Doe #4, and John Doe #5, Individually,	}	
Defendants.	}	

On May 24, 2001, The Court granted the Texas Defendants' motion to dismiss.

Based upon the Motion for Rule 54(b) Certification and the supporting brief, the Court hereby ORDERS:

(1) The Court expressly determines for the reasons set forth in the Plaintiffs' brief that there is no just reason for delay;

(2) All claims against Wayne Scott, Ray Parra, Rey Selvera, William H. Brooks, Cathy Doyle, Veronica Ballard, Carl Jeffries,

Ethel White, Larry Hermance, Cynthia Lyons, John Doe #1, John Doe #2, John Doe #3, John Doe #4, and John Doe #5 are dismissed with prejudice;

(3) The dismissal is a final judgment appealable to the North Dakota Supreme Court; and

(4) Final judgment shall be entered accordingly.

Dated this 13 day of July, 2001.

/s/ Gail Hagerty
Hon. Gail Hagerty
Judge of the District Court

[Received & Filed July 16, 2001 Clk of Crt. Burleigh Co.]

STATE OF NORTH DAKOTA	IN THE DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT

Michelle Hansen, Stacey Hanson, and Michelle Hansen, as Personal Representative of the Estates of Gordon and Barbara Erickstad,	}	Civil No. 08-00-C-02567
Plaintiffs	}	**JUDGMENT**
v.	}	
Wayne Scott, Ray Parra, Rey Selvera, William H. Brooks, Cathy Doyle, Veronica Ballard, Carl Jeffries, Ethel White, Larry Hermance, Cynthia Lyons, Robert R. Lawrence, John Doe #1, John Doe #2, Joe Doe #3, John Doe #4, and John Doe #5, Individually,	}	
Defendants.	}	

In this case, the Court entered its Opinion and Order dated May 24, 2001, granting the Texas Defendants' Motion to Dismiss.

The Plaintiffs filed a Motion for Rule 54(b) Certification along with their Brief in Support of Motion for Rule 54(b) Certification. Based upon the Motion for Rule 54(b) Certification, the Court then issued an Order dated July 13, 2001, certifying that the dismissal against the Texas Defendants is a final judgment appealable to the

North Dakota Supreme Court and that judgment shall be entered accordingly.

THEREFORE, it is adjudged that Judgment be entered, pursuant to N.D.R.Civ.P. 54(b) and the Plaintiffs' action against Wayne Scott, Ray Parra, Rey Selvera, William H. Brooks, Cathy Doyle, Veronica Ballard, Carl Jeffries, Ethel White, Larry Hermance, Cynthia Lyons, John Doe #1, John Doe #2, John Doe #3, John Doe #4, and John Doe #5 is dismissed with prejudice.

WITNESS, the Honorable Gail Hagerty, District Judge, and my hand and seal of the Court this 16th day of July, 2001.

/s/ Debra Simenson
Clerk of the District Court

[Entered July 30, 2002]

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

ORDER ON PETITION FOR REHEARING

Supreme Court No. 20010195

Appeal from the District Court for Burleigh County.

Michelle Hansen, Stacey Hanson, and Michelle Hansen, as Personal Representative of the Estates of Gordon and Barbara Erickstad, Plaintiffs and Appellants

v.

Wayne Scott, Ray Parra, Rey Selvera, William H. Brooks, Cathy Doyle, Veronica Ballard, Carl Jeffries, Ethel White, Larry Hermance, Cynthia Lyons, Defendants and Appellees

- - - - - - -

Robert R. Lawrence, John Doe #1, Joe Doe #2, John Doe #3, John Doe #4, and John Doe #5, individually, Defendants

This appeal having been heard by the Court at the February 2002 Term and an opinion having been filed on June 10, 2002, by:

Chief Justice Gerald W. VandeWalle, Justice William A. Neumann, Justice Mary Muehlen Maring, Justice Carol Ronning Kapsner, and District Judge Bruce E. Bohlman, sitting in place of Justice Dale V. Sandstrom;

and a petition for rehearing having been filed by Charles K. Eldred and Daniel J. Hovland for the Appellees and the Court having

considered the matter, it is hereby ORDERED AND ADJUDGED, that the petition be and is hereby **DENIED.**

AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this Court.

Dated: July 30, 2002

By the Court:

/s/ Gerald W. VandeWalle
Chief Justice
North Dakota Supreme Court

Attest: /s/ Penny Mill
Clerk of the Supreme Court

Seal

STATE OF NORTH DAKOTA

ss.

IN THE SUPREME COURT.

The petition for a rehearing upon the appeal in the above entitled action is hereby DENIED.

/s/ Carol Ronning Kapsner

/s/ Mary Muehlen Maring

/s/ Bruce Bohlman

/s/ Gerald W. VandeWalle, C.J.
Judges Supreme Court,
State of North Dakota.

Interstate Compact for the Supervision of Parolees and Probationers (codified at, *inter alia*, N.D. CENT. CODE §12-56-01; TEX. CODE CRIM. PROC. ANN. art. 42.11).

"Compact. Entered into by and among the contracting states, signatories hereto, with the consent of the Congress of the United States, granted by an act entitled 'An Act Granting the Consent of Congress to any two or more States to enter into Agreements or Compacts for Cooperative effort and Mutual Assistance in the Prevention of Crime and for other purposes'.

The contracting states solemnly agree:

1. That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact, herein called 'sending state', to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact, herein called "receiving state", while on probation or parole, if:

a. Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there.

b. Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there. Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

2. That such receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will

be governed by the same standards that prevail for its own probationers and parolees.

3. That duly accredited officers of a sending state at all times may enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of the state party hereto as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state, but if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

4. That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.

5. That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary more effectively to carry out the terms of this compact.

6. That this compact shall become operative immediately upon its execution by any state as between it and any other state or states executing. When executed it shall have the full force and effect of law within such state,

the form of execution to be in accordance with the laws of the executing state.

7. That this compact shall continue in force and remain binding upon each executing state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other states party hereto."